STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLEY SQUIER, Personal Representative of the Estate of ALEXANDER SQUIER, BRANDY SQUIER, JOSHUA SQUIER, and BRICE WERNETTE,

Plaintiffs-Appellants,

v

CITY OF BIG RAPIDS, TIMOTHY J. VOGEL, and LARRY STAFFEN,

Defendants-Appellees,

and

ORCHARD PLACE ESTATE TRUST, DONALD L. TRITES, and LAWRENCE MORNINGSTAR,

Defendants.

UNPUBLISHED
June 13, 2006

No. 259387
Mecosta Circuit Court
LC No. 96-011481-CK

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a final order dismissing plaintiffs' claims of nuisance per se, trespass-nuisance, and gross negligence based on governmental immunity. We affirm.

This case arises from the death of 11-year-old Alexander Squier, who drowned after he attempted to traverse rapids on the Muskegon River on an inner tube. He was swept off the tube by the rapids and pinned between a submerged log and a large rock. The rapids were not natural to the river but were created by defendant City of Big Rapids when it lined a submerged water main that crossed the river with rocks, creating a "cofferdam," and later added rocks to the cofferdam to facilitate the removal of water. Defendants Vogel and Staffen oversaw portions of the cofferdam project.

We review de novo a trial court's application of governmental immunity to determine whether the governmental entity was entitled to judgment as a matter of law. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 321-322; 701 NW2d 179 (2005). We consider all documentary evidence to determine if suit is barred by governmental immunity and whether a material issue of

fact exists regarding the applicability of an exception. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004). To avoid summary disposition of a governmental entity, a plaintiff must allege facts justifying application of an exception to governmental immunity. *Id*.

Plaintiffs first argue that the trial court erred in dismissing plaintiffs' claim that the cofferdam constituted a nuisance per se.[1] We disagree. "[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992). Because building and maintaining the cofferdam served the important purpose of supplying the city with potable water and because plaintiffs allege that better warnings and an adequate tail slope would have prevented injury, building and maintaining the cofferdam was not a nuisance per se. See *id.* at 463, 477. Plaintiffs never argued that the general activity of maintaining a cofferdam is a nuisance per se, but instead argue that the characteristics of this particular cofferdam made it dangerous. *Id*. Accordingly, the trial court did not err in dismissing plaintiffs' nuisance per se claims.

Plaintiffs next argue that the trial court erred in dismissing their trespass-nuisance claims. We disagree. There can be no trespass, and hence no trespass-nuisance, unless defendants invaded plaintiffs' property. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 207; 521 NW2d 499 (1994). It is undisputed that plaintiffs were not riparian owners of the Muskegon River. Nevertheless, plaintiffs argue that the cofferdam was a trespass-nuisance on land held in the public trust for use by the public. In *Bronson v Oscoda Twp*, 188 Mich App 679, 683 n 4; 470 NW2d 688 (1991), we rejected the similar argument that a township committed trespass-nuisance by maintaining a pier that affected a lake bottom held in public trust by the state. Even though the lake in *Bronson* was held in trust for use by the public, we held that "there was no invasion of a private property interest and, therefore, the trespass-nuisance exception to governmental immunity is inapplicable." *Id*. at 683. Similarly, plaintiffs' argument that a member of the public can claim trespass-nuisance against a governmental entity for an alleged trespass on lands held in public trust is without merit.

Plaintiffs argue that *Pound v Garden City School Dist*, 372 Mich 499, 501-502; 127 NW2d 390 (1964), supports the trespass-nuisance claim because the city interfered with public property where the decedent had a right to be. Nevertheless, *Pound* is distinguishable from the case at bar because the public sidewalk with which the defendant interfered in *Pound* was not part of the defendant's premises and was not subject to the defendant's authority. *Id.* Here, the relevant portion of the river was subject to the city's authority. See *Li*, *supra* at 474. Plaintiffs' claim that the Department of Natural Resources' authority over the Muskegon River transformed the city's action into a trespass-nuisance ignores the holding in *Bronson* and is unpersuasive. The DNR had the same authority over the lake in *Bronson* that it had over the Muskegon River in this case, and yet the *Bronson* Court held that the plaintiff's trespass-nuisance claim would fail because the plaintiff failed to show any invasion of a private property interest. The *Bronson*

[1] We assume, without deciding, that a nuisance per se was an exception to governmental immunity at the time of the accident.

Court did not fail to consider *Pound*, but expressly referred to it when comparing the doctrines of public nuisance and trespass nuisance.[2] *Bronson*, *supra* at 684 n 5. Likewise, in *Li*, *supra*, a city culvert draining a dam's pond was found within the city's control, rendering *Pound* inapplicable. The Muskegon River is more like the lake in *Bronson* and the waterway in *Li* than the sidewalk in *Pound*, so *Pound* does not save plaintiffs' trespass-nuisance claim.

Plaintiffs next argue that summary disposition was improper because both Staffen and defendant Vogel were grossly negligent, and their gross negligence was the proximate cause of the accident. See MCL 691.1407(2). We disagree. Even assuming that a reasonable fact-finder could find that Staffen and Vogel were both grossly negligent with regard to the incident, the alleged gross negligence was not the proximate cause of the accident. According to MCL 691.1407(2)(c), a governmental employee is only liable for gross negligence if the negligent acts are "the proximate cause of the injury or damage." "The phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).[3] In this case, the most immediate cause of the injury was the decision to risk the obviously turbulent and dangerous rapids contrary to several signs warning about the danger and written warnings received from the livery that provided the inner tubes. Decedent's group decided to go over the cofferdam knowing of the option to put in downstream, and decedent opted not to put on a personal flotation device before entering the river.[4]

These are merely a few of the causes of decedent's death that were more immediate and direct than the allegedly negligent effort of Staffen and Vogel to create and maintain a safe and functional water system. In *Tarlea*, *supra* at 92, we held that a coach's order to run in hot weather was not the most immediate cause of a decedent's death partially because of the fact that "all the students, including [the decedent], had the choice of participating or not participating in the run." Similarly, decedent and other members of his group exercised direct control over the decisions of whether and how to encounter the hazardous water, so the allegedly negligent acts of Staffen and Vogel[5] were not the proximate cause of the accident.

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[2] Plaintiffs essentially claim a public nuisance, but there is no public nuisance exception to governmental immunity. *Li*, *supra* at 474.

[3] Although this case was filed after *Robinson* was decided, *Robinson* applies retroactively. C*urtis v Flint*, 253 Mich App 555, 567; 655 NW2d 791 (2002).

[4] Plaintiffs' argument that the dangers posed by the water were not immediately apparent from the group's visual perspective upstream from the rapids conflicts with the record's indication that group members could see the rapids from the livery. The group further discussed the risks and rewards of entering the river upstream from them. Under the circumstances, the argument adds little to the issue of causation.

[5] Because plaintiffs have failed to demonstrate a material issue of fact that would prevent Vogel from being dismissed on the basis of employee immunity, we need not address the trial court's finding that he enjoyed absolute immunity.

Plaintiffs' attempts to distinguish *Robinson* are unpersuasive. Whatever rules may apply to intervening and superseding causes created by ordinary tort defendants in other tort cases, *Robinson* clearly states that a governmental employee's action must be the most immediate, efficient, and direct cause of injury before a plaintiff may recover from the employee. Applying plaintiffs' theory would leave Staffen and Vogel liable if their negligence was *a* proximate cause of the injury, and such a holding would conflict with *Robinson's* straightforward construction of MCL 691.1407(2)(c).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder